FILED
AUG 18 1993
OFFICE OF THE CLERK

93-274

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GOLDEN GATES HEIGHTS INVESTMENTS,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

PETITION FOR CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT

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15 August 1993

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QUESTION PRESENTED

I. UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHERE A GOVERNMENT ENTITY ACQUIRES PRIVATE PROPERTY IN EMINENT DOMAIN FOR PUBLIC USE AS OPEN SPACE, MAY COMPENSATION BE BASED ON THE ASSUMPTION THAT, ABSENT THE EMINENT DOMAIN PROCEEDINGS, THE GOVERNMENT ENTITY COULD HAVE REQUIRED THE PROPERTY OWNER TO DEVOTE TWO THIRDS OF THE PARCEL TO OPEN SPACE USE WITHOUT COMPENSATION?

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CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

PETITION FOR CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal for the First Appellate District entered in this proceeding.

CITATION TO OPINION BELOW

The opinion of the California Court of Appeal for the First Appellate District, published at 14 Cal.App.4th 1203, appears in the appendix hereto.

JURISDICTION

The opinion of the California Court of Appeal for the First Appellate District was filed on March 3, 1993. The California Supreme Court denied review on May 20, 1993. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1257.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Constitution of the United States
Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In 1986, petitioner purchased a half acre parcel of land located in San Francisco, California. Portions of the parcel

were covered by distinctive scenic rocky outcroppings. Under applicable local zoning, the parcel was devisable into fourteen single family lots. Development of the parcel with fourteen single family homes would have been physically feasible and consistent with surrounding uses.

Shortly after purchasing the parcel, petitioner applied to subdivide the parcel into fourteen standard size single family lots. Following some delay, the City of San Francisco (the "City") commenced eminent domain proceedings to acquire the parcel for public use as open space. The City then informed petitioner that the subdivision application was "suspended" and "deemed denied" due to pendency of the eminent domain action.

At the eminent domain trial, petitioner sought compensation based on the fourteen lots permitted under the San Francisco Planning Code. The City, however, maintained that petitioner should be compensated for only five lots. It reasoned that, absent the eminent domain proceedings, the City Planning Commission would have exercised its discretion by requiring petitioner to devote to open space use, the two thirds of its property covered with scenic rock outcroppings. Permission to build on even five lots would have been conditioned upon dedication of the balance of the property to the visual benefit of the public.

Petitioner contended that the City's approach to valuation was violative of the Fifth Amendment to the United States Constitution, as explicated in such cases as *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The trial court, however, accepted the City's theory of valuation, and awarded compensation based on the assumption that petitioner would have been required to devote two thirds of its property to the visual benefit of the public as open space, and permitted

to build on only five lots. This ruling deprived petitioner of compensation for two thirds of its parcel, worth approximately one million dollars. The California Court of Appeal for the First Appellate District affirmed the trial court's theory of valuation in the published opinion appended hereto.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO PROVIDE A MORE COMPREHENSIBLE AND COMPREHENSIVE FRAMEWORK FOR JUST COMPENSATION ANALYSIS, CONSONANT WITH THE UNDERLYING PURPOSE OF THE JUST COMPENSATION CLAUSE

Candor requires any student of Fifth Amendment just compensation jurisprudence to acknowledge that this area of the law cries out for a comprehensive and comprehensible analytic framework. In the half century and more since this Court decided such seminal cases as *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926), and *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), state and federal courts have failed to develop an intellectually and morally credible doctrine reconciling government's police power authority to prohibit nuisances and promote harmonious land use, with its obligation to pay just compensation where private property is taken for public use.

Much of the case law attempting such a reconciliation is a jumble of distinctions without differences. Great and perhaps insupportable weight is placed on the distinction between physical and regulatory takings. Full compensation has been afforded for even minute physical invasions. Yet regulatory takings, which deprive an owner of most of the value of

property, are permitted to go uncompensated if the owner retains a scintilla of economically viable use. (Compare *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), with *Keystone Coal Association v. DeBenedictis*, 480 U.S. 470 (1987) and cases cited in footnote 18 therein) This distinction has, naturally, prompted property owner litigants and some jurists, to seek an alchemy for transforming regulatory interference into physical invasion. (See generally, *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992)) Conversely, governmental entities and other jurists, such as those in the case at bar, have stretched and strained to apply standards from regulatory takings cases even in the face of a total physical appropriation.

What is notably absent from the bulk of the case law, however, is any consideration of the question which should stand at the heart of every just compensation analysis: whether state action has "unfairly singled out the property owner to bear a burden which should be borne by the public as a whole." (*Yee v. City of Escondido*, 112 S.Ct. 1522, 1526 (1992). See also *Armstrong v. United States*, 364 U.S. 40 (1950)) While this Court's recent opinions in *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886 (1992), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), indicate that there are limits on the public benefits which may be extracted from private property owners under the guise of prohibiting a nuisance, or as a *quid pro quo* for a permit to improve property, a clearer and more comprehensive statement is needed to insure meaningful and consistent enforcement of the Fifth Amendment guarantee of just compensation in the lower courts. This case, which is free of factual and procedural clutter, offers an ideal context in which to provide the necessary clarification.

The case at bar is a textbook illustration of the deficiencies of contemporary just compensation jurisprudence.

Calculation of the compensation due in this case should have been straightforward. The City, recognizing the scenic value of the rocky outcroppings on petitioner's property, sought to acquire the entire property for public use as open space. This, of course, constituted a physical taking of the property.[1] Thus, the City was required to pay petitioner the full value of the property. The full value of the property could and should have been calculated based on the number of lots permitted under the City Planning Code.

Instead of awarding petitioner the full value of the property, assuming development consistent with local zoning law and the character and density of development on adjoining properties, however, the California courts instead awarded compensation based on the assumption that, absent the eminent domain proceedings, the City would have used its police power to coerce petitioner to devote the scenic rock outcroppings to the visual benefit of the public, without payment of any compensation whatsoever. This Court should grant certiorari to explain why such a holding cannot satisfy the just compensation requirement imposed by the Fifth Amendment to the United States Constitution.

The lower courts' analysis should be held constitutionally defective for three distinct reasons. First, the City of San Francisco was not free to require dedication of the scenic rock outcroppings to the benefit of the public, under the guise of prohibiting a public harm. As this Court indicated in *Lucas v. South Carolina Coastal Commission*, *supra*, such a characterization is a natural temptation to any local government seeking to compel a particular land use for the benefit of the public,

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[1]See *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (physical taking occurs when government "takes title").

without payment of just compensation. Nevertheless, a use consistent with adjacent uses (and in this case with applicable zoning), ordinarily imports the absence of a common law nuisance, and under these circumstances, government may not prohibit the use without payment of just compensation. (*Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886 (1992)) The California Court of Appeal endeavored to distinguish *Lucas* on the ground that the property owner in that case was deprived of all economically viable use of his property. This Court should grant certiorari to hold that government may not compel uncompensated dedication of any private property to the benefit of the public, under the guise of prohibiting a public harm, regardless of whether or not this would deprive the owner of all economically viable use of the property.

A second constitutional defect in the Court of Appeal's analysis, is its assumption that the San Francisco Planning Commission could have conditioned issuance of any building permits for petitioner's parcel, upon petitioner's agreement to dedicate two thirds of its property to the visual benefit of the public. Such a requirement would, on its face, appear to run afoul of this Court's holding in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Yet the Court of Appeal held that such a requirement would not run afoul of the principles enunciated in *Nollan*, because the dedication required in this case would not have entailed a physical invasion.

This is a distinction without a difference. From petitioner's economic standpoint, the cost of preserving the rock outcroppings for the visual benefit of the public is the same, whether the public is permitted to climb over the rock outcroppings or is confined to admiring the outcroppings from the base of the slope or from boats at sea. This court should grant certiorari to hold that issuance of a building permit may not be conditioned upon dedication of private property to the

benefit of the public, regardless of whether the public is granted an easement to physically trespass on the property.[2] This court should also hold that where the government has elected to take property in fee simple, payment for the property may not be excused based on speculation that the government could have bestowed essentially the same benefits upon the public without actually taking title to the property.

A third critical shortcoming of the Court of Appeal's analysis in this case, is that it gives no consideration whatsoever to the question which should provide the key to all just compensation analysis, to wit, whether state action has "unfairly singled out the property owner to bear a burden which should be borne by the public as a whole." (*Yee v. City of Escondido*, 112 S.Ct. 1522, 1526 (1992). See also *Armstrong v. United States*, 364 U.S. 40 (1950)) Stressing that petitioner would not have been deprived of all economically viable use of the property if permitted to build on five lots, the Court of Appeal never paused to inquire whether the cost of preserving the rock outcroppings for the benefit of the public, was a cost which should be borne by the taxpaying public rather than by petitioner.

As this Court stated in dicta in *Yee v. City of Escondido*, a compensable regulatory taking occurs if "the purpose of the regulation ***or*** the extent to which it deprives the owner of the economic use of the property suggests that the regulation has unfairly singled out the property owner to bear a burden which should be borne by the public as a whole." (*Yee*, *supra*, 112 S.Ct at 1526. Emphasis added.) The *Yee* test is stated in the

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[2]In so holding, this court should expressly overrule the Ninth Circuit's opinion in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), and adopt the views expressed by dissenting Judge Beezer therein.

disjunctive; even where the *extent* of interference with an owner's economic use of his property does not, in and of itself, reveal a compensable taking, compensation is nonetheless due if "the *purpose* of the regulation ... suggests that the regulation has unfairly singled out the property owner to bear a burden which should be borne by the public as a whole." This Court should grant certiorari to hold that a regulation which forces a private party to bear costs which should be borne by the public as a whole, constitutes a compensable taking, regardless of whether the regulation deprives the private party of all economically viable use of his property.

The practical shortcomings of the mode of analysis employed by the California courts are manifest. This mode of analysis is an open invitation to the grossest sort of abuse. Following this approach, any county or municipality seeking to acquire land, might always acquire the land for a fraction of market value. The governmental entity need only select a parcel without subdivision or building permits, and then urge that even if it had not chosen to acquire the land, it would never have authorized subdivision or issued permits for more than one structure. While this approach would prove particularly attractive to governmental entities seeking to acquire land for open space or park use, there would be nothing to prevent the government from actually building on property so acquired, after the eminent domain judgment became final.

There is virtually no limit to how much land government could acquire free of charge utilizing this method. The larger the unsubdivided parcel the government could locate, the deeper the discount it would enjoy. A county might acquire a 100 acre ranch on the outskirts of a growing city, and value

the land on the assumption that it could be improved with only a single home.

The California court's opinion honors the values underlying the Fifth Amendment Just Compensation Clause in the breach. Yet, it is a characteristic manifestation of the state of contemporary just compensation jurisprudence. Indeed, the opinion below is the natural and inevitable consequence of the miscellany of disjunctive and mechanical just compensation tests presently employed by the lower courts. This Court should therefore grant certiorari to elucidate the implications of its holdings in *Nollan*, *Lucas*, and *Yee*, and to provide a unified, coherent, and comprehensible framework for just compensation analysis.

CONCLUSION

For the aforestated reasons, a writ of certiorari should issue as prayed.

Respectfully submitted,

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15 August 1993

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CITY AND COUNTY OF SAN FRANCISCO
Plaintiff and Respondent,
v.
GOLDEN GATE HEIGHTS INVESTMENTS,
Defendant and Appellant.

No. AO55754
(Superior Court No. 915-867,
City and County of San Francisco)
California Court of Appeal
First Appellate District
Division Three
Filed March 3, 1993

This is an eminent domain action brought by the City and County of San Francisco (City) to acquire a single lot owned by Golden Gate Heights Investments (GGHI). The property is a vacant, steep hillside in the Sunset neighborhood of the city. The property is known as the "Rock Outcropping" because it bears large and unique rock outcroppings visible from the Pacific Ocean. The City is acquiring the property to preserve it for open space. GGHI appeals from the judgment in condemnation, challenging the court's valuation of the property.

FACTS

In 1986, GGHI purchased the subject property for $200,000. At the time of the purchase, both GGHI and the seller believed the property could be developed for residential use. The property was zoned R1, which meant it could be developed into 14 residential lots.

Immediately following the close of escrow, GGHI retained an architect and set up a meeting with the City Planning Department to discuss development of the property. During the meeting at the City Planning Department, it was discovered that the property inadvertently had been omitted from the City's open space map; GGHI was led to believe the City would not process an application to develop the property until the City determined whether it wanted to acquire the property.

On November 13, 1989, City's Board of Supervisors adopted a resolution of public interest and necessity to acquire the property for open space. On February 9, 1990, City filed this eminent domain action.

At trial, City maintained that, even the absence of eminent domain proceedings, the planning commission would have required GGHI to devote to open space use, nine of the fourteen lots authorized under the planning code. Lucian Blazej, a city planner, testified that in February of 1987, GGHI was advised that even if the property could be developed, 14 lots on the property was unrealistic; only 5 lots could be developed. This was due to the natural features of the rocks, the fact there was natural foliage, and the virgin nature of the property. Dean Macris, Director of Planning for the City, stated that although there was no way to absolutely predict what the planning commission would do, he thought it unlikely the commission would approve development on more than five lots.

City produced two expert appraisal witnesses, John Clifford and Frank Mahoney, to testify to the value of the condemned property. Clifford valued the property at $535,000. Mahoney valued it at $500,000. GGHI's expert witness was Arthur Gimmy. Gimmy valued the property at $1,620,000.

The trial court found the subject property could not have been subdivided into more than five lots with a fair market value of $100,000 per lot. Accordingly, it valued the property at $500,000. The court also found there had been no unreasonable delay in commencing an eminent domain action which would justify precondemnation damages. This appeal followed.

DISCUSSION

Planning Commission Approval

GGHI contends the trial court erred by valuing the property based on speculation that City's Planning Commission could have required GGHI to dedicate nine out of fourteen possible lots to public use as open space. The contention is based on the premise that City's planning code authorizes fourteen lots on the subject property. Citing Lucas v. South Carolina Coastal Council (1992) ____ U.S. ____ [112 S.Ct. 2886] and Nollan V. California Coastal Comm'n

(1987) 483 U.S. 825, GGHI maintains City could not require it to dedicate nine out of fourteen lots for open space without paying just compensation. GGHI misreads these cases.

In Lucas, the property owner purchased beachfront property prior to the adoption of a state statute prohibiting all development o the property. After passage of the new legislation, the property owner filed suit, contending that the legislation effected a taking of his property without just compensation. The trial court found the legislation deprived the property owner of any reasonable economic use of the property and rendered it valueless. The state Supreme Court reversed. The court ruled that when a regulation respecting the use of property is designed to prevent serious public harm, no compensation is owned under the takings clause. The United States Supreme Court disagreed, holding that "noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'--which require compensation--from regulatory deprivations that do not require compensation." (Lucas v. South Carolina Coastal Council, supra, _____ U.S. _____ [112 S.Ct. at p. 2899].)

However, the Lucas court acknowledged and reaffirmed its historical approach to governmental regulation of private property. The approach starts with the rule that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (Penna. Coal Co. v. Mahon (1922) 260 U.S. 393, 415.) Although the high court has avoided any set formula for determining how far is too far since Mahon, it has articulated at lease two categories of regulatory action as compensable. The first encompasses regulations that compel the property owner to suffer a physical invasion of his or her property; the second is where regulations deny all economically beneficial or productive use of land. (Lucas v. South Carolina Coastal Council, supra, _____ U.S. _____, _____ [112 S.Ct. at p. 2893].) Since the trial court in Lucas determined that the South Carolina legislation had rendered the beachfront property valueless, the case falls within the second category.

In Nollan, the California Coastal Commission conditioned a beachfront building permit upon granting a public easement across the property. The Supreme Court held that if California wanted to advance it plan to provide public access to the ocean by using its

power of eminent domain, the Fifth Amendment required the state to pay for it. (Nollan v. California Coastal Comm'n, supra, 483 U.S. at pp. 841-842.) Nollan involves a physical taking, rather than an regulatory taking. (See Yee v. City of Escondido, Cal. (1992) _____ U.S. _____, _____ [112 S.Ct. 1522, 1530]; Blue Jeans Equities West v. City and County of San Francisco (1992) 3 Cal.App. 4th 164, 169.) As such, it falls within the first category of regulatory which mandates compensation.

Both Lucas and Nollan can be distinguished from the case at bench. Unlike the facts in Lucas, GGHI's property would not have been rendered valueless had the planning commission permitted development of only five lots. Although GGHI purchased a single parcel of real estate which it intended to subdivide into 14 lots, restriction of the property to 5 lots would not have deprived GGHI of "any reasonable economic use" of the land. "Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole...." (Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104, 130.) Nor are the facts here similar to those in Nollan. The planning commission's denial of a 14-lot subdivision application would not have required GGHI to "submit to the physical occupation of [its] land." (Yee v. City of Escondido, Cal., supra, _____ U.S. _____, _____ [112 S.Ct. at p. 1530].)

Comparable Sales

At the commencement of trial, GGHI moved to exclude evidence of the prices paid by City for adjacent parcels which were acquired for use as open space. The court denied the motion without prejudice. GGHI renewed its objection at the time City introduced it at trial. Citing Evidence Code section 822, subdivision (a)(1).[1] GGHI now asserts the trial court erred by admitting and relying upon evidence of comparable sales consummated under the threat of eminent domain condemnation. The contention lacks merits.

Section 822, subdivision (a) states: "In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Section 814 to 821, inclusive, the following matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of the property: [¶] (1) The price or other terms and circumstances of an acquisition of property or property interest if the acquisition was for a public use for which the property could have been taken by eminent domain, except that the price or other terms and circumstances of an acquisition of property appropriated to a public use or a property interest so appropriated shall not be excluded under this section if the acquisition was for the same public use for which the property could have been taken by eminent domain." (Emphasis supplied.) GGHI contends the above-underscored exception, added by amendment in 1988 (see Stats. 1987, ch. 1278, § 1, p. 4548), applies only to condemnation of utility properties. (See Matteoni & Veit, Condemnation Practice in California (Cont.Ed.Bar Supp. 1992) § 9.49, p. 161.) We do not read the statute as so limited. Nor does GGHI's cited authority so state.

Moreover, even if we assume it was error to accept evidence of the sale of adjacent properties, there was no prejudice to GGHI. As the statement of decision makes clear, the trial court was greatly influenced by evidence of other comparables: "The City's appraisers also relied heavily on the sales of 368 and 352 San Marcos for $125,000 and $135,000 per lot respectively. These properties had lower development costs than the subject and are located in a superior neighborhood with superior views. A reasonable adjustment for these factors supports a value of $100,000 for the subject. Even the sale on which Mr. Gimmy heavily relies, Hawk Hill, indicated $110,000 per lot. An adjustment downward would be necessary for the subject property because the evidence indicated that Hawk Hill would have lower development costs than the subject."

Prior Sale of the Property

GGHI contends it was error to admit evidence of GGHI's purchase price of the subject property in 1986. It maintains the purchase price was depressed due to 20 years of "condemnation blight," the sale was too old to use as a comparable and City's

motivation was to prejudice the court against awarding an excessive profit by GGHI. We disagree.

Evidence of the sale of the subject property is specifically admissible pursuant to section 815. Moreover, "evidence of other sales of the identical real property is admissible and that matters such as a change of value between the time of the sale and the time of the condemnation ordinarily go merely to the weight of the evidence and not to compel exclusion. [Citations.]" (L.A. Country Flood etc. Dist. v. McNulty (1963) 59 Cal.2d 333, 337.)

Substantial Evidence

GGHI contends the trial court's valuation was not supported by substantial evidence. The contention is principally based on the fact that valuation was based on subdivision of the property into five rather than fourteen units. We have previously found that determination to be proper.

GGHI also criticizes the court's reliance on valuation of the San Marcos Street properties, its failure to discuss City's seven other comparables in its statement of decision, City's appraisers' subdivision ("land residual") method of analysis, and their assumption City would not act on a subdivision application until at least three years after the date of trial.

In determining the sufficiency of the evidence to support a judgment, this court does not reweigh the evidence. Rather, we resolve all conflicts in favor of the prevailing party and view the evidence in the light most favorable to that party. (Hasson v. Ford Motor Co. (1982) 32 Cal.3d 388, 398.) We give the prevailing party the benefit of every reasonable inference from the evidence. (In re Marriage of Mix (1975) 14 Cal.3d 604, 614.) Put another way, while we examine all evidence, we will consider only the evidence supporting the successful party. (Community Cause v. Boatwright (1987) 195 Cal.App.3d 562, 569.)

With respect to the San Marcos Street properties, the evidence supports the court's finding that these properties have lower development costs, are located in a better neighborhood and have better views. In addition, there is no support for GGHI's claim that the court ignored seven other comparables. There was evidence that although the sales of these properties was for more than $100,000

per unit, each of the lots would have lower development costs than the subject property. The court's failure to discuss each comparable in its statement of decision does not mean they were ignored.

GGHI's criticism of the "land residual" method of appraisal is somewhat confusing. As GGHI states in its own opening brief, City's two appraisers each placed primary reliance upon a "direct comparison" analysis and only employed a "land residual" analysis as a check. Moreover, as it acknowledges in its reply brief, the court's statement of decision relies exclusively upon the direct comparison analysis.

Costs for Unreasonable Precondemnation Activities

At trial GGHI produced the following evidence to show City had engaged in unreasonable precondemnation activity: On February 8, 1987, the City Planning Department wrote to GGHI that "[i]f the Recreation and Park Commission determines it has no interest in acquiring the property, the Planning Department is obliged to permit development of the site, subject to the Planning Code." In February of 1988, City approached GGHI concerning a possible voluntary sale of the property. Negotiations concerning a voluntary sale broke down in August of 1988, when the deputy city attorney denied knowledge of an open space designation of the property. GGHI subsequently brought an inverse condemnation action in federal court. However, the federal court dismissed the action, since GGHI had not filed a development application. GGHI subsequently filed a subdivision application. In December 1989, GGHI submitted an amended application, including photographs, Proposition M findings, an amended parcel map, and an environmental evaluation to support the application. City filed its eminent domain action 63 days later.

GGHI now contends that, in addition to the fair market value of the property, it is entitled to be reimbursed for its architect, engineer and consultant fees, its subdivision application fees, property taxes, mortgage carrying costs, and prejudgment interest incurred during the two-year period intervening between City's notice of formal intent to condemn[2] and the date of judgment.

A property owner is entitled to precondemnation damages where it can be demonstrated that "the public authority acted improperly either by unreasonably delaying eminent domain action

following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value." (Klopping v. City of Whittier (1972) 8 Cal.3d 39, 52, fn. omitted, emphasis supplied; see also Smith v. City and County of San Francisco (1990) 225 Cal.App.3d 38, 46-47.) Whether there has been unreasonable delay or unreasonable conduct by the condemner is a question of fact. (Cambria Spring Co. v. City of Pico Rivera (1985) 171 Cal.App.3d 1080, 1098.)

In the instant action, we need only note there is no evidence the property decreased in value as a result of City's conduct. GGHI purchased the property for $200,000; it was appraised for between $500,000 and $1,680,000.

Moreover, the facts in this case are entirely different than those alleged in People ex rel. Dept. of Transportation v. Gardella Square (1988) 200 Cal.App.3d 559. In that case, a partnership had purchased property for the purpose of developing a shopping center. The Department of Transportation filed a condemnation action seeking one-half of the partnership property. The partnership answered and alleged they had met all requirements for county permits and entitlements for construction except for a state encroachment permit; the department had delayed processing the encroachment permit to prevent construction of the shopping center, and as a result of this action the partnership was unable to meet loan commitments and was faced with foreclosure. The partnership alleged the precondemnation activity constituted a taking and entitled the partnership to inverse condemnation damages for loss of use of its principal. (Id., at p. 564.) The Court of Appeal remanded the action for a determination of whether the partnership could prove the essential Klopping elements. (People ex rel. Dept. of Transportation v. Gardella Square, supra, at p. 574.) In contrast to the allegations in Gardella Square, GGHI did not file a complete subdivision application until after City had adopted a resolution to acquire the property. The record is devoid of evidence City intentionally delayed development of GGHI's property.

DISPOSITION

The judgment is affirmed.

White, P.J.

We concur:
Merrill, J.
Chin, J.

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1. All further statutory references are to the Evidence Code unless otherwise indicated.

2. The court found this date to be November 13, 1989.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE
FIRST APPELLATE DISTRICT
DIVISION THREE

FILED
MAR 30 1993
Court of Appeal-First App. Dist.
RON D. BARROW
By Deputy

CITY AND COUNTY OF SAN FRANCISCO
vs.
GOLDEN GATE HEIGHTS INVESTMENTS, ET AL.
A055754
SAN FRANCISCO COUNTY NO. 915867

BY THE COURT:

The petition for rehearing is denied.

DATED: MAR 30 1993

WHITE, P.J.

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
MAY 20 1993
Robert Wandruff, Clerk
BY DEPUTY

No. SO32254 (AO55754)

GOLDEN GATE HEIGHTS INVESTMENTS,

Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

Appellant's petition for review DENIED.

The request for an order directing depublication of the opinion is denied.

LUCAS
Chief Justice